

Observations on the Law of Joint Tenancy in Wisconsin - Conclusion

Patrick W. Cotter

Follow this and additional works at: <http://scholarship.law.marquette.edu/mulr>



Part of the [Law Commons](#)

Repository Citation

Patrick W. Cotter, *Observations on the Law of Joint Tenancy in Wisconsin - Conclusion*, 40 Marq. L. Rev. 92 (1956).
Available at: <http://scholarship.law.marquette.edu/mulr/vol40/iss1/9>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.

OBSERVATIONS ON THE LAW OF JOINT TENANCY IN WISCONSIN

CONCLUSION*

PATRICK W. COTTER**

II

In 1839, the Territorial Legislature enacted Wisconsin's first statute designed to reverse the common law presumption of joint tenancy.¹ It was taken from the MICHIGAN TERRITORIAL LAWS, and required, except in the case of executors and trustees, an express declaration of joint tenancy in order to prevent a conveyance to two or more from creating a tenancy in common. The statute was considered and interpreted by the Supreme Court in the leading case of *Ketchum v. Walsworth*,² where the court held that the section did not apply to tenancy by the entirety and hence property in the joint names of husband and wife was not subject to the debts of the husband on his death. The wife took the whole interest in the property by survivorship. This view was also taken by the majority of other states having similar enactments.³ Even at the date of the decision the problem which confronted the court had been resolved by the legislature and appeared in the first statutory revision in 1849; by Section 45 conveyances to husband and wife were expressly excepted from the operation of the new statute.⁴ The court in the *Ketchum* case decided the issues under the old law since

* This is the conclusion of an article the first part of which appeared in 39 MARQ. L. R. 110 (1955). The second and third parts have been combined in this issue.

** Mr. Cotter is a partner in the firm of Wood, Warner, Tyrrell & Bruce, Milwaukee, Wisconsin; University of Wisconsin, B.A. 1938, LL.B., 1940, LL.M., 1946. Member of Milwaukee County, Wisconsin and American Bar Associations.

¹ WIS. TERRITORIAL STATS. 1839, p. 178; "No estate in joint tenancy in lands, tenements, or hereditaments, shall be held or claimed by or under any grant, devise, or conveyance whatever, hereafter to be made, other than to executors or trustees, unless the premises therein mentioned shall expressly be thereby declared to pass, not in tenancy in common, but in joint tenancy; and every such estate, other than to executors or trustees, unless otherwise expressly declared as aforesaid, shall be deemed to be in tenancy in common, any law, custom, or usage to the contrary notwithstanding."

² 5 Wis. 95 (1856).

³ TIFFANY, LAW OF REAL PROPERTY, (3rd Ed. 1911) 226; FREEMAN, COTENANCY AND PARTITION (1886) p. 65.

⁴ WISCONSIN REVISED STATUTES, 1849, Ch. 56. §43. Estates, in respect to the number and connection of their owners, are divided into estates in severalty, in joint tenancy and in common; the nature and properties of which respectively, shall continue to be such as are now established by law, except so far as the same may be modified by the provisions of *this chapter*. (Italics added)

§44. All grants and devises of lands, made to two or more persons, except as provided in the following section, shall be construed to create estates in common, and not in joint tenancy, unless expressly declared to be in joint tenancy.

§45. The preceding section shall not apply to mortgages, nor to devises or grants made in trust, or made to executors, or to husband and wife.

the conveyances as well as the death of the husband occurred prior to the 1849 statute.

As thus enacted in Chapter 56, Revised Statutes 1849, the provisions regarding "estates in respect to the number and connection of their owners" remained substantially unchanged through the revisions of 1858,⁵ 1878,⁶ and 1925.⁷ In fact, the first two sections are still the same in the 1955 statutes,⁸ the only section to undergo change being Section 230.45, when it gained two subsections in 1933,⁹ clarification to include personal property in 1945,¹⁰ and broadening in 1947 to permit deeds from a grantor to himself and another as grantees.¹¹

The statutory history of estates in joint tenancy in Wisconsin is, therefore, rather simple and direct. In brief, the statutes enacted in 1849 are still the law today. In addition, Section 230.45 (2) now provides for the creation of joint tenancy in realty or personalty by a deed or transfer from husband to wife or from wife to husband (eliminating the necessity for a 3rd party);¹² and Section 230.45 (3) permits the creation of joint tenancy in realty by a deed to two or more grantees where one of the grantees is also the grantor and further relaxes the strictness of Section 230.44 as applied to deeds by providing that a joint tenancy may be created if the method of describing the grantees "evinces an intent" (as distinguished from "expressly declared") to create a joint tenancy.¹³

Other statutory provisions dealing with particular phases of joint

⁵ WIS. STATS. (1858) Ch. 83.

⁶ WIS. STATS. (1878) §§2067, 2068, 2069.

§2067 made one change substituting the words "of these statutes" for the words "of this chapter" in §43 Ch. 56 RS. 1849 (see italics note 4); and, inadvertently perhaps, inserting a comma after the word "devises" in §2069 so the section read: "The preceding section shall not apply to mortgages, nor to devises, or grants made in trust. . . ." This insertion may have caused the court to apply its obviously mistaken reasoning in reaching what was probably a proper result in *Farr v. Trustees of Grand Lodge*, 83 Wis. 446, 53 N.W. 738 (1892). See discussion of this case, *infra*, p. 98.

⁷ WIS. STATS. (1925) §§230.43; 230.44; 230.45. The only other change occurred in 1917 when the above mentioned comma was deleted from §2069. Laws 1917. Ch. 566, §35.

⁸ WIS. STATS. (1955). §§230.43, 230.44.

⁹ LAWS 1933, Ch. 437.

¹⁰ LAWS 1945, Ch. 195.

¹¹ LAWS 1947, Ch. 140.

¹² WIS. STATS. (1955) §230.45 (2). Any deed, transfer or assignment of real or personal property from husband to wife or from wife to husband which conveys an interest in the grantor's lands or personal property and by its terms evinces an intent on the part of the grantor to create a joint tenancy between grantor and grantee shall be held and construed to create such joint tenancy, and any husband and wife who are grantor and grantee in any such deed, transfer or assignment heretofore given shall hold the property described in such deed, transfer or assignment as joint tenants.

¹³ WIS. STATS. (1955) §230.45 (3): Any deed to 2 or more grantees, including any deed in which the grantor is also one of the grantees, which, by the method of describing such grantees or by the language of the granting or habendum clause therein evinces an intent to create a joint tenancy in grantees shall be held and construed to create such joint tenancy.

tenancy will be discussed later in connection with problems that led to their adoption or arose as a result of their adoption.

A.

The problem of the existence of tenancies by the entirety has been laid to rest in Wisconsin, but because the statutes we are concerned with were involved, and because the nature of the tenancy gave rise to many of the same problems as in joint tenancy, a review of the cases dealing with the abolition of that tenancy is interesting and helpful.

Ketchum v. Walsworth,¹⁴ it will be remembered, preserved tenancies by the entirety because of the peculiar nature of the relationship between husband and wife. By way of dicta, it went too far in discussing the nature of the tenancy¹⁵ and in *Bennett v. Child*¹⁶ the court overruled the dicta and clarified the rights of the husband in dealing with land owned in this manner: "All the authorities agree," the court said,

"that the husband during the coverture cannot alienate the whole or any part of the estate so as to give title after his death, as against the wife surviving him. But we do not understand that at common law he could not convey his life interest or estate therein."¹⁷

And since at common law he could convey or mortgage the land and give the grantee the use of the entire real estate during his (the husband's) life,¹⁸ the court allowed creditors to issue execution and sell the property, by which sale the purchaser acquired such title as would give him the use of the premises during the life of the husband.¹⁹ At common law, not only could the husband convey an interest in the grantee during his life, but he could convey his contingency of survivorship, so that if he survived the wife, the grantor would take the whole estate.²⁰ Preston states:

"An alienation by the husband alone, in the life time of the wife, will, in the event of his surviving his wife, be good for the share of himself and his wife."²¹

Tiffany suggests that such a conveyance by a husband alone might become operative on a theory of estoppel if he survives the wife.²²

¹⁴ *Supra*, note 2.

¹⁵ 5 Wis. 95 at p. 102, the court said, "... and for the same reason neither can alien, without the consent of the other, any portion or interest therein."

¹⁶ 19 Wis. *362 (1865).

¹⁷ *Ibid.*, at p. 365.

¹⁸ FREEMAN, *op. cit.*, §§73, 74; Barber v. Harris, 15 Wend. 615: "... during the life of the husband he undoubtedly has the absolute control of the estate of the wife and can convey or mortgage it for that period. By marriage he acquires, during coverture, the usufruct of all her real estate which she has in fee simple, fee tail, or for life."

¹⁹ Brown v. Baraboo, 90 Wis. 151, 62 N.W. 921 (1895). *Contra*: Gillan v. Dixon, 65 Pa. St. 395 (1870).

²⁰ TIFFANY, *op. cit.*, p. 232.

²¹ 1 Preston on Estates 134.

²² TIFFANY, *op. cit.*, p. 234.

The argument was made in the *Bennett* case that the recently enacted act concerning the rights of married women²³ changed the husband's common law rights of usufruct and that the wife could hold, convey and devise property as a *feme sole*. The court held, however, that that statute was not intended to apply to estates of this kind and applied the common law rules. As a result of this decision the married woman's act was amended in 1878 to include property held in joint tenancy with her husband.²⁴

The issue then arose as to whether the act as amended abolished tenancy by the entirety. The question was put to the court in *Citizens Loan and Trust Co. v. Witte*²⁵ and the court there held that the 1878 amendments read in the light of the revisor's notes²⁶ indicate an intention to cover cases of tenancy by the entirety, and held that the wife was jointly liable with the husband on a mortgage which they assumed on property conveyed to them jointly. The court refused to accept the wife's argument that she and her husband held the property as tenants by the entirety and that the married women's property acts did not apply to such an estate.

The question posed but not clearly answered in the *Witte* case was met squarely by the court in *Wallace v. St. John*.²⁷ In this case the husband purchased land, the deed running to husband and wife; the wife conveyed an undivided one-half to her son. She died and the husband sought to have the deed set aside. The trial court held that the husband and wife held as tenants by the entirety and that the son by the wife's deed got only her life interest. The Supreme Court reversed, holding that the husband and wife held as joint tenants because under the statutes, tenancy by the entirety was abolished. The reasoning was that the change in §2067 R.S. 1878²⁸ substituting the word "statutes"

²³ WIS. STATS. (1858) Ch. 95, §1. The real estate, and the rents, issues, and profits thereof, of any female now married, shall not be subject to the disposal of her husband, but shall be her sole and separate property, as if she were a single female. §2. The real and personal property of any female who may hereafter marry, and which she shall own at the time of marriage, and the rents, issues, and profits thereof, shall not be subject to the disposal of her husband, nor be liable for his debts, and shall continue her sole and separate property. §3. Any married female may receive by inheritance or by gift, grant, devise or bequest, from any person other than her husband and hold to her sole and separate use, and convey and devise, real and personal property, and any interest or estate therein, and the rents, issues, and profits, in the same manner and with like effect as if she were unmarried, and the same shall not be subject to the disposal of her husband, nor be liable for his debts.

²⁴ WIS. STATS. (1878), §2340. The real estate of every description, including all held in joint tenancy with her husband, and the rents . . . (same as above) . . . as if she were unmarried.

§2341. Same as §2 above.

§2342. . . . (same as above, except) and any interest or estate therein of any description including all held in joint tenancy with her husband, and the rents

²⁵ 116 Wis. 60, 92 N.W. 443 (1902).

²⁶ WIS. ANNOTATIONS, §246.01 Reviser's Note, 1878.

²⁷ 119 Wis. 585, 97 N.W. 193 (1903).

²⁸ *Supra*, note 6.

for "chapter" incorporated the provisions of the chapter on the rights of married women; and the amendments in that act to include all property "held in joint tenancy with her husband,"²⁹ together with the revisor's notes indicate an intention to include property held by husband and wife as tenants by the entirety. Because the oneness which characterized the relationship of husband and wife at common law no longer existed under the statutes, a tenancy by the entirety could not be created; but since joint tenancy and tenancy by the entirety had all the same unities and were identical except for the relationship of husband and wife, a deed to them after the common law oneness was destroyed created a joint tenancy.

Since the *Wallace* case there seems to be no question of the doctrine that a deed to husband and wife creates a joint tenancy and cannot create a tenancy by the entirety because of the control given a married woman over her property of any kind. The question when arising in later cases was summarily dismissed.³⁰ Then in 1925, in a brief opinion by Rosenberry, J.³¹ the court extended the doctrine to the limit when it held that even where a deed expressly states that the husband and wife are to take as tenants by the entirety, they will take only as joint tenants, because tenancy by the entirety no longer exists under our law.³²

It was several years later before the same issue was clarified in regard to personal property. The court in *DuPont v. Jonet*³³ recognized the substitution of joint tenancy for tenancy by the entirety in the case of real property but stated that no such change was made as to personal property. By 1928, the court got straightened out on this point and, reversing the *DuPont* case, held that the reasoning of the *Wallace* case applies with equal force to personalty.³⁴

²⁹ *Supra*, note 24.

³⁰ *Bassler v. Rewodlinski*, 130 Wis. 26, 109 N.W. 1032 (1906). *Friedrich v. Huth*, 155 Wis. 196, 144 N.W. 202 (1913). Here the court said, "It is well settled in this state that where lands are deeded to husband and wife a joint tenancy is thereby created . . ." citing only the *Bassler* Case. *Church v. Nash*, 163 Wis. 424, 158 N.W. 89 (1916), where the question of tenancy by entirety is not even raised.

³¹ *Will of Ray*, 188 Wis. 180, 205 N.W. 917 (1925).

³² See Note 4 Wis. L. Rev. 107, in which the author contends that the *Ray* Case is wrong and that tenancy by the entirety was not necessarily abolished by the *Wallace* Case; that the reasoning in the *Wallace* Case was based on legislative intent to include tenancies by the entirety in the married women's property acts. But, because of other statutes which expressly mention tenancy by the entirety the court must have incorrectly determined the legislative intent and it is clear that the legislature still believes tenancies by the entireties to exist. §230.47 was enacted in 1903, just prior to the *Wallace* Case; §230.48 was enacted in 1925; §72.01 in 1917. But doesn't the author neglect the fact that tenancies by the entirety had been created before the amendments of 1878 and the court expressly said in the *Wallace* Case that they were not retroactive (119 Wis. at p. 586). The legislature must then, in subsequent enactments provide for those tenancies which are in existence.

³³ 165 Wis. 554, 162 N.W. 664 (1917).

³⁴ *Aaby v. Citizens National Bank*, 197 Wis. 56, 221 N.W. 417 (1928).

B.

It was stated earlier that the problems of construction which beset the common law courts also created no little difficulty for the Wisconsin court. The statutes by reversing the common law presumption made it necessary for the court to decide whether there was sufficient intention expressed to create a joint tenancy or whether a tenancy in common resulted from the grant or devise. The statute requires that a deed must be expressly declared to be in joint tenancy before it will be given that effect.³⁵ The 1933 amendment relaxes this rule in the construction of deeds and will give effect to a deed that evinces an intent to create a joint tenancy.³⁶ Wisconsin cases on the subject of construction are not numerous. In the majority of cases where property is conveyed to two persons jointly they are husband and wife and the problem of construction does not arise. Grants and devises to husband and wife being excepted from the operation of the statute,³⁷ the common law presumption of joint tenancy is applied.³⁸ Parol evidence has been permitted to be introduced to show that the wife's name in a land contract was omitted by mistake and that it was intended that she be named with her husband. She was allowed to take the entire interest under the land contract on the death of the husband.³⁹ And where the deed ran to two named persons who were in fact husband and wife, although there was no recital of that fact in the deed, parol evidence was received showing the existence of the relationship and the grantees will take as joint tenants.⁴⁰

Some interesting cases arose early in Wisconsin dealing with other exceptions from the statutes. The issue of whether a mortgage to two or more mortgagees created a joint tenancy was raised in *Farwell v. Warren*.⁴¹ The statutes were not considered; the court held that since the mortgage was given by the mortgagor to several mortgagees to secure individual debts of the mortgagor to each mortgagee and not to secure a debt owed to them jointly, the mortgagees were tenants in common of the mortgage even though given to them jointly.⁴² Thus the fact that the mortgage was void in respect to certain creditors, did not defeat the mortgage as to the others. In *Fiedler v. Howard*⁴³ the court recognized the statute and the exceptions and where the mortgage was to husband and wife applied the common law presumption, finding nothing to rebut that presumption as in the *Farwell* case. In *Williams v. Jones*⁴⁴

³⁵ WIS. STATS. (1955) §230.44, Notes 4 and 8 *supra*.

³⁶ WIS. STATS. (1955) §230.45(3) note 13, *supra*.

³⁷ WIS. STATS. (1955) §230.45 (1).

³⁸ *Friedrich v. Huth*, Note 30, *supra*; *Will of Ray*, Note 31, *supra*.

³⁹ *Church v. Nash*, 163 Wis. 424, 158 N.W. 89 (1916).

⁴⁰ *Hass v. Williams*, 218 Wis. 429, 261 N.W. 216 (1935).

⁴¹ 76 Wis. 527, 45 N.W. 217 (1890).

⁴² See 39 MARQ. L. REV. 114, FREEMAN, *op. cit.* §16.

⁴³ 99 Wis. 388, 75 N.W. 163 (1898).

⁴⁴ 175 Wis. 380, 185 N.W. 231 (1921).

four brothers who owned land as tenants in common sold the land and took a note and mortgage running to them all, jointly. One brother died, devising his estate to Jones. The surviving brothers claim that they were joint tenants of the mortgage, and acquire the share of the deceased brother by survivorship. The court held that a mere recital, even in a mortgage, that it is joint does not preclude the court from examining the circumstances leading to the execution of the mortgage. For if the interests of the covenantees are several, the covenant, though in form joint, should be construed to be several. The court thought it was proper for the trial court to overrule the brothers' demurrer so it could consider the circumstances to determine the intent of the parties.

Another case dealing with what the court calls an exception to the statute is the case of *Farr v. Trustees of Grant Lodge AOUW*.⁴⁵ It contains, in this writer's opinion, not only an obvious misinterpretation of the statute but also some unsound analogical reasoning. The case involves the question of whether, when one of two joint beneficiaries of an insurance policy dies before the insured and no change of beneficiary is made, the other takes the whole principal on the death of the insured. Counsel for the surviving joint beneficiary argued, properly it would seem, on principles of insurance law; counsel for the defendant, however, raised the issue of joint tenancy and that joint tenancy and survivorship are "contrary to the genius of our institutions." The court took up the joint tenancy argument and held that the plaintiff beneficiary should recover the whole principle as a surviving joint tenant. The policy contained no words expressing an intention to create a joint tenancy and the court in dealing with the statutes acknowledged that a presumption was created in favor of tenancies in common. The court then quoted Section 2069 (230.45 (1)) providing that

"... the preceding section shall not apply to mortgages, nor to *devises* (italics by court) or grants made in trust or made to executors. . . ."

and concluded that the statute excepted devises. Obviously the statute refers to "devises . . . made in trust . . ." and explicitly includes devises in the preceding section. The court continued by analogy that if devises were excepted then so too are legacies of personalty, and then to strain the analogy to the breaking point, said that because insurance policies are so nearly analogous to legacies they too are excepted and when a policy is payable to two or more on the death of the insured a joint tenancy is created without any further expression. All this roundabout reasoning was done to accomplish the same result that could have been reached by an application of principles of insurance law.⁴⁶ The case has never been overruled or qualified. It has been

⁴⁵ 83 Wis. 446, 53 N.W. 738 (1892).

⁴⁶ See Bacon, *Benefit Societies and Life Insurance*, (1894) §264; VANCE, INSUR-

quoted in subsequent cases as establishing the rule that joint tenancies could exist in personality.⁴⁷ But in 1917, a comma which had been inserted in Section 2069 after the word "devises" in the 1878 revision, was deleted.⁴⁸

The first case involving construction of a deed or devise was *Saxton v. Weber*.⁴⁹ In that case the court held that a devise to A for life in trust to pay the income to specified beneficiaries and with a remainder to six persons "to each, his heirs and assigns forever one undivided sixth part of the realty" created a tenancy in common and those able to take at the death of the life tenant took as tenants in common and were not defeated by the failure of some of the remainders to take effect because of the rule against perpetuities.

The Wisconsin rule is clear, in that it is not necessary to use the words "joint tenancy" or "as joint tenants" in order to create a joint tenancy. It is not sufficient, however, to use merely the word "jointly" in referring to the parties in the introductory clause.⁵⁰ The court has left open the question of whether the use of the word "jointly" in the granting clause is sufficient, where it refers specifically to title and not to the parties.⁵¹ The outstanding case on construction is *Weber v. Nedin*⁵² in which, on rehearing, Rosenberry, C. J. briefly reviews the general principles of cotenancy, and considers the problem of whether the words "to the survivor" are sufficient to indicate the intention of the grantor to create a joint tenancy. In the deed in question the phrase appeared in the introductory clause reciting the parties ". . . and Thomas Nedin and Sofi Nedin, his wife and to the survivor of either, . . . parties of the second part." The granting clause conveyed the premises to "the said parties of the second part, their heirs and assigns forever."

ANCE (1930) 580 states: ". . . the death of any one of the beneficiaries before the insured's should terminate his interest in the policy, which should inure to the benefit of the survivors. Since such beneficiaries can scarcely be regarded as joint tenants of the policy, the survivorship resulting in these cases may be explained as follows: Upon the death of one of such beneficiaries, his share results to the insured, who by his maintenance of the policy in its original form manifests his intent that the lapsed share shall pass to the survivors under the original declaration. Cf. where beneficiaries were a class, the court held that the survivor takes. *Elgar v. Equitable Life Assur. Soc.*, 113 Wis. 90, 88 N.W. 927 (1902).

The court could also have reached the result by applying the constitution of the Society which, although amended to so provide after the death of the one beneficiary but before the death of the insured, did state that the survivor would take. See p. 25 Printed Case.

⁴⁷ *Riedler v. Howard*, 99 Wis. 388, 75 N.W. 163 (1898); *DuPont v. Jonet*, 165 Wis. 554, 162 N.W. 664 (1917).

⁴⁸ See *supra*, notes 6 and 7.

⁴⁹ 83 Wis. 617, 53 N.W. 905 (1892).

⁵⁰ *Fries v. Kracklauer*, 198 Wis. 547, 224 N.W. 717 (1929).

⁵¹ *Ibid.* at p. 551, citing *Case v. Owen*, 139 Ind. 22, 38 N.E. 395, where such use of the word was held sufficient to create a joint tenancy. In *Weber v. Nedin*, past, the court recognizes "very respectable authority" to the contrary of the ruling in the *Fries* Case.

⁵² 210 Wis. 39, 246 N.W. 307, 686 (1933).

The grantees were not permitted to take as husband and wife within the exception of the statute, because they were not in fact husband and wife. In the original opinion the court held, in reliance on dicta in the *Fries* case,⁵³ that the use of the words "their heirs and assigns forever" was repugnant to the creation of a joint tenancy and that where two provisions in a deed were repugnant, the one in the granting clause should prevail and thus that an intention to create a tenancy in common was shown. On rehearing, the court withdrew the dicta in the *Fries* case stating that the use of the words "their heirs and assigns" does not negative the idea of survivorship. Those very words, the court points out, were the ones used to create a joint tenancy at common law. Since there is no repugnancy between the clauses, the expressed intention of the grantor in the use of the word "survivor," which is an incident of an estate in joint tenancy and no other under Wisconsin law, was to create a joint tenancy. The court later reaffirmed their views expressed in *Weber v. Nedin*, in *Estate of Richardson*⁵⁴ and *Neitge v. Severson*.⁵⁵ In the *Richardson* case a deed to two women as tenants by the entirety was held to create a joint tenancy where the word "survivor" appeared in the clause reciting the consideration, the habendum clause, and the warranty clause.

The cases above discussed are the only Wisconsin cases in which there arose a problem of construction of a deed in the light of the statutes creating a presumption of tenancy in common to determine whether the words used were sufficient to meet the statutory requirement that a joint tenancy be expressly declared.⁵⁶ Clearly, "expressly declared" leaves some leeway in the choice of language. The Wisconsin court will apply the normal rules of construction to effectuate the intention of the parties.⁵⁷ The legislature has provided for this in the construction of deeds⁵⁸ and it would appear from the court opinion in *Weber v. Nedin*, decided before the enactment of Section 230.45 (3), that the same construction will be given all grants or devises.

C.

One of the most difficult problems that has confronted the court is the effect of a grant or transfer by the owner to himself and another, where additional words are used indicating an intention to create a

⁵³ *Supra* notes 49 and 50.

⁵⁴ 229 Wis. 426, 282 N.W. 585 (1938).

⁵⁵ 256 Wis. 628, 42 N.W.2d 149 (1950).

⁵⁶ *Estate of Gabler*, 265 Wis. 126, 60 N.W.2d 720, 61 N.W.2d 823 (1953) presented an interesting question to the court. While the intention of the parties was clear that postal certificates and cooperative stock be held by them as joint tenants, the unities required were not fulfilled. The certificates were in individual names and a joint tenancy could not result.

⁵⁷ *Weber v. Nedin*, *supra*, note 51.

⁵⁸ Wis. STATS. §230.45 (3), *supra* note 13. This section was enacted as a result of the attention focused on the problem by the Weber Case.

joint tenancy.^{58a} The majority of cases have involved certificates of deposit, savings accounts, or general bank accounts, and because of the nature of the subject matter the problem becomes further complicated.⁵⁹ There are no Wisconsin cases involving tangible personal property; there is one case involving certificates of stock⁶⁰ and two realty.⁶¹ The problem first arose in *Breitenbach v. Schoen* where Mrs. Schoen endorsed her stock certificates to herself or Peter Schoen, her son, or survivor. She also subsequently purchased new certificates which were issued to herself and her son in the same manner. The certificates were never given to the son but were kept at the mother's request in her son-in-law's strong box to which she had a key. The court held that the four unities were as characteristic of joint tenancy in personalty as they were in realty. Manifestly, the owner of certificates cannot convey an interest in them to herself. The indorsement could operate only to convey an interest in her son and since there was neither unity of title nor of time a joint tenancy could not be created in the certificates; but rather a tenancy in common was created. As to the certificates issued by the company to Mrs. Schoen and her son or survivor, the above objection couldn't apply since they both took by the same conveyance and at the same time. The court held, however, that as to both classes of certificates there was not such a delivery as was necessary to complete the gift from the mother to the son. The son never had possession of the gifts, actual or constructive; they were kept by the son-in-law for the mother.

The court in reaching the decision in the *Breitenbach* case thwarted the intent of the mother which was clearly evidenced by her actions. The theory of delivery of gifts, however, which was the basis for denying any property interest to the son would justify such a result since no amount of intention will make a gift valid if the requisite delivery is wanting.⁶² That is the issue that remained open for the court in later

^{58a} See the following annotations on this and related problems: 103 A.L.R. 1123; 135 A.L.R. 993; 149 A.L.R. 879; 127 A.L.R. 780; 137 A.L.R. 348; 23 A.L.R.2d 1171; 44 A.L.R.2d 595.

⁵⁹ See *infra*, p. 117 *et seq.*, where the problems are discussed more in detail. *Marshall and Ilse Bank v. Voigt*, 214 Wis. 27, 252 N.W. 355 (1934). *Estate of Staver*, 218 Wis. 114, 260 N.W. 655 (1935). *Estate of Skilling*, 218 Wis. 574, 260 N.W. 660 (1935). *Schwanke v. Garlt*, 219 Wis. 367, 263 N.W. 176 (1935). *Tucker v. Simrow*, 248 Wis. 143, 21 N.W.2d 252 (1946). *Plainse v. Engle* 262 Wis. 506, 56 N.W.2d 89, 57 N.W.2d 586 (1952). *Boehmer v. Boehmer*, 264 Wis. 15, 58 N.W.2d 411 (1953). *Kelberger v. First Federal Savings & Loan*, 270 Wis. 434, 71 N.W.2d 257 (1955). *Estate of Schley*, 271 Wis. 74, 72 N.W.2d 767 (1955).

See also the following cases involving questions of taxation:

Estate of Hounsel, 252 Wis. 138, 31 N.W.2d 203 (1948). *Dept. of Taxation v. Berry*, 258 Wis. 544, 46 N.W.2d 757 (1951).

⁶⁰ *Breitenbach v. Schoen*, 183 Wis. 589, 198 N.W. 622 (1924).

⁶¹ *Hass v. Hass*, 248 Wis. 212, 21 N.W. 398 (1946). *Moe v. Krupke*, 255 Wis. 33, 37 N.W.2d 865 (1949).

⁶² *BROWN, PERSONAL PROPERTY* (1936) Sec. 38. See *MECHEM, Requirement of*

cases, and which posed considerable difficulty until the court in *Estate of Staver*⁶³ abandoned the gift theory of joint bank accounts for the contract theory.⁶⁴ The question has arisen before⁶⁵ and the court found a sufficient delivery of certificates of deposit taken in the joint names of husband and wife where they were kept in a box accessible to both parties. The court there recognized that if the donor depositor retains complete control of the certificates or of a bank book the gift is not complete, and no interest passes to the contemplated donee cotenant. And so the court held in *Marshall & Ilsley Bank v. Voigt*⁶⁶ where the husband had kept complete control of the bank books, finding also that the husband intended the arrangement solely for his own convenience in handling the fund, in order that his wife might draw money, with his permission, without presenting authority at the bank, and that there was no intention to make a gift to the wife of any interest in the account. This principle has been confirmed by the court in more recent cases. In *Plainse v. Engle*⁶⁷ the court found that a bank account was carried in joint names for the convenience of the original owner. While it recognized the rule in *Estate of Hounsel*,⁶⁸ the court refused to apply it where there was an evident pattern or policy of joint ownership.

In *Estate of Staver*,⁶⁹ the issue arose over certificates of deposit which were payable to "Joseph Staver or Frank J. Staver." Joseph, who deposited the money, retained the certificates. Joseph then died and by his will bequeathed the certificates to Frank J. The question arose as to whether Frank takes under the will or by survivorship. In meeting the question of delivery, the court said:

"... the question is not one of transfer at all. The situation is in no way analogous to the transfer of an article of personal property or of an existing chose in action."⁷⁰

In dealing with such property where the possession is in the donor, of course delivery is necessary but

"... In the case of joint bank accounts evidenced by certificates of deposit, the chose in action or contract claimed against the bank is at the outset created not only in the depositor but in the person whom he designates as a joint payee or owner of the deposit. The delivery of the certificates or pass book which gives vitality and existence to the chose in action must create a legal interest and ownership both in the depositor and the third person direct-

Delivery in Gifts of Chattels and of Choses in Action Evidenced by Commercial Instruments, 21 ILL. L. R. 341, 457, 568.

⁶³ 218 Wis. 114, 260 N.W. 655 (1935).

⁶⁴ See *infra*, p. 121.

⁶⁵ Dupont v. Jonet, *supra*, note 33.

⁶⁶ 214 Wis. 27, 252 N.W. 355 (1934).

⁶⁷ *Supra*, note 59.

⁶⁸ *Supra*, note 59.

⁶⁹ *Supra*, note 63.

⁷⁰ *Ibid.* at p. 119.

ly. . . . The joint interest is perfected by the initial delivery, and no further transfer is required by the depositor."⁷¹

The interest of the donee co-owner of the deposit is analogous to and somewhat stronger than the interest of the donee beneficiary in a contract for the benefit of third parties.

The legal title then on the death of one would be in the survivor. It would be possible, however, to show by clear and satisfactory evidence a conscientious duty upon the part of the survivor to hold the title in trust for another. Upon this modification the court distinguishes the *Voigt* case,⁷² where the depositor, for the sole purpose of his own convenience, makes a joint deposit, as illustrating a situation which would warrant affecting the legal title with a trust in favor of the husband's estate. The court modifies the ruling in the *Voigt* case to eliminate the contrary notions of delivery expressed therein. *DuPont v. Jonet*⁷³ was limited to its finding and its dicta in regard to delivery was withdrawn. The result in that case was consistent with the theory that legal title to the certificates or pass book is in the survivor, subject to any showing by clear and satisfactory evidence that would warrant affecting the title with a trust. The court expressly overruled the holding in *Breitenbach v. Schoen*⁷⁴ denying the right of the surviving joint tenant on the ground that there had been no delivery to him of the certificates. The ruling in regard to the creation of a joint tenancy in the certificates previously owned and assigned was not disturbed.

The rule in the *Staver* case was similarly applied in a case involving a savings account evidenced by a pass book.⁷⁵ In *Schwanke v. Garlt*,⁷⁶ the rules in the *Staver* and *Skilling* cases were unsuccessfully attacked. The plaintiff contended that the court was without authority to hold that a certificate of deposit or savings account payable to two persons or the survivor was governed by principles of contract law rather than the law of joint tenancies in personal property. They argued that since the constitution bound the court to apply principles of the common law, unless they were inconsistent with the constitution or changed by the legislature,⁷⁷ the court must apply the common law rules of joint tenancy. The court resolved the issue by asserting that there was no common law applicable to joint bank certificates and savings accounts in Wisconsin or elsewhere when the constitution was adopted. The law is not settled even today and the court is free to change its opinion as to what rules should apply to transactions of this nature. The court then applied the rule of the *Staver* case to a savings account which the owner had the

⁷¹ *Ibid.* at pp. 119-120.

⁷² *Supra*, note 66.

⁷³ *Supra*, note 33.

⁷⁴ *Supra*, note 60.

⁷⁵ *Estate of Skilling*, *supra*, note 59.

⁷⁶ *Supra*, note 59.

⁷⁷ Section 13, Article XIV, WISCONSIN CONSTITUTION.

bank transfer from her name to the joint account of herself and her granddaughter, although the original owner retained the pass book. There was no doubt of the intention of the parties. The rule of the *Staver* case, however, applies only where a present interest is created in the person alleged to be a joint tenant and will not apply where the depositor signs a paper directing that at her death the account be payable to certain named persons.⁷⁸

The contract theory established in the *Staver* case has received judicial approval in many cases since its inception.⁷⁹ However, in the recent case of *Kelberger v. First Federal Savings & Loan of LaCrosse*⁸⁰ the writer feels that the court broadened the rule beyond a reasonable application. In sustaining the survivorship rights of a non-contributing joint depositor the court seemed to lose sight of the contract between the Association and the depositor in its determination to give effect to the depositor's intention. While the facts are not too clear, Julia opened a joint account with her sister Lydia. She signed papers for a joint account with right to withdraw and to survivorship. Lydia, however, failed to sign a signature card and no withdrawals could be made by her. The pass book was issued in Julia's name alone. On one occasion when Lydia attempted to make a withdrawal the Association refused to permit it and issued a check payable only to Julia. Even conceding that Julia intended upon her death that Lydia should take the balance of the account, she failed, it would seem from the facts, to set up a joint account within the rules of the Association. In the absence of such compliance it is difficult to understand how the court finds a contract to enforce and of which Lydia can be the third party beneficiary. The case contains an excellent review of the contract theory and the Massachusetts' cases formulating and interpreting it.

It will be noted that in all the cases concerning bank accounts of one kind or another, the original owner or the depositor in a series of negotiations with the bank turns over whatever evidence of the account he had and the bank issues a new certificate, passbook, etc., evidencing an account in the joint names of the depositor and another. Such a procedure would eliminate the objection raised in the *Breitenbach* case to the certificates of stock which were merely assigned by the owner to herself and her son as joint tenants. In these cases it can be argued that there is unity of both time and title when the bank recreates the chose in action in favor of the joint owners.⁸¹ Nor does there seem to be any question of unity of possession since possession of a chose can mean no more than the ability and present power to enforce the right existing in one's favor. Possession of the pass book or certificate of deposit,

⁷⁸ *Tucker v. Simrow*, *supra*, note 59.

⁷⁹ See cases cited *supra*, note 59.

⁸⁰ 270 Wis. 434, 71 N.W.2d 257 (1955).

⁸¹ Cf. the discussion of the *Hass* case re unities, below.

although a condition precedent to enforcement of the right, does not alone determine the possession of the chose.⁸²

The peculiar aspects of the relationship created by joint bank accounts are discussed in greater detail later in this article.⁸³

In 1946 in the case of *Hass v. Hass*⁸⁴ the court, for the first time, had the problem of determining the nature of the tenancy created by a deed from A to A and B. The intention to create a joint tenancy was expressed repeatedly in the deed; the granting clause, habendum clause and warranty all spoke of "a life estate as joint tenants during their joint lives and an absolute fee forever in the remainder to the survivor of them, his or her heirs and assigns." The court, citing *Breitenbach v. Schoen*⁸⁵ held that a joint tenancy could not be created by such a conveyance because the requisite unities of time and title were lacking. The court recognized authority contra, some of which is based on different statutes; and reviewed *Weber v. Nedin*⁸⁶ and *Fries v. Kracklauer*.⁸⁷ In meeting the plaintiff's argument that Section 230.45 (3)⁸⁸ (as it existed prior to the 1947 amendment) was broad enough to include a deed from an owner to himself and another, the court said that the term "grantees" was used in a technical sense and referred to persons to whom any estate or interest passes by deed. The statute at that time did not contemplate such a result as contended. Thus if the deed could not create a joint tenancy because it was ineffective to convey any interest or estate from the grantor to herself—what did it create? The court held that it

"... created in the parties a tenancy in common for their joint lives and conveyed an estate in fee to the son if he survived the mother. If he predeceased his mother, his death terminated his interest in the estate. In that event the condition upon which the remainder was to pass to him could not happen and the entire property would be in the grantor. . . . | We see no reason why this type of survivorship may not be created by deed. It has one advantage over the right of survivorship incident to joint tenancy, it cannot be destroyed by the act of one of the parties."⁸⁹

In an opinion filed on a denial of a motion for rehearing,⁹⁰ the court calmed the fears of counsel that a "legal oddity," a tenancy in common with right of survivorship, had been created and would have dire results. An elementary classification of survivorship was set forth: (1) survivorship as an incident to joint tenancy—dependent upon the nature of the tenancy; (2) survivorship as an incident of tenancy by the en-

⁸² 48 A.L.R. 189 at 206, and cases cited there.

⁸³ *Infra*, p. 117 *et seq.*

⁸⁴ 248 Wis. 212, 21 N.W. 398 (1946).

⁸⁵ *Supra*, note 60.

⁸⁶ *Supra*, note 52.

⁸⁷ *Supra*, note 50.

⁸⁸ *Supra*, note 13.

⁸⁹ *Hass v. Hass*, *supra* at pp. 221-222.

⁹⁰ *Ibid.* at p. 224a; 22 N.W.2d 151.

tirety—dependent upon the status of the parties; (3) survivorship as a remainder to the surviving tenant in common—dependent upon express provisions of the instrument creating the remainder.

Undoubtedly the result reached in the *Hass* case accomplished the intention of the grantor. She had requested a deed by which her son would get her farm after her death but in the event that he should predecease her she would retain it. The deed was sufficiently explicit so that this result could be accomplished by the court's construction of the deed.

Because of the interpretation placed upon §230.45 (3) by the *Hass* case, the section was amended in the next session of the legislature to provide that a grantor may be a grantee within the meaning of the statute.⁹¹ The legislative modification of the common law rule was limited to transfers of real estate.

Two years later in *Moe v. Krupke*⁹² the court was presented with a fact situation which more clearly pointed up the need for the 1947 amendment since the words in the deed did not permit the court to carry out the grantor's intention as in the *Hass* case. The transfer from *Moe* to himself and his sister having occurred prior to the 1947 amendment, the court held that the case was controlled by the rule of *Hass v. Hass* and although the intention of the grantor to create a joint tenancy was clear in the language of the deed a tenancy in common resulted. The court refused to consider the 1947 amendment as a repudiation by the legislature of the *Hass* case. It characterized the legislation as creating a new estate unknown to common law by applying the incidents of joint tenancy to a transfer which meets the statutory terms.

Thus the court has consistently shown its insistence upon strict observance of the technical fundamentals of the common law except where those fundamentals have been clearly changed by statute. The court has relaxed this rule only in the case of bank deposits; and that has been not so much a relaxation of the rules governing the creation of joint tenancies as rather an application of different principles of law.⁹³ Clearly the *Breitenbach* case, so far as it deals with the creation of joint tenancy in personal property is still the law and is in accord with the *Hass* and *Moe* cases.⁹⁴

D.

The common law of severance of a joint tenancy had remained relatively untouched by legislation in Wisconsin until 1945.⁹⁵ Many of the

⁹¹ *Supra*, note 13.

⁹² 255 Wis. 33, 37 N.W.2d 865 (1949).

⁹³ See *Estate of Staver, supra*, p. 102 and *infra*, p. 121.

⁹⁴ The court reaffirmed this principle in *Estate of Gabler*, 265 Wis. 126, 60 N.W.2d 720, 61 N.W.2d 823 (1953).

⁹⁵ §230.455, see *infra* note 110, was originally enacted in 1945. On the subject of partition see Wis. STATS. (1955), Ch. 276 and 277.

more difficult severance problems of the common law have never been raised or decided by the Wisconsin Supreme Court. An interesting and unusual question of severance was presented to the court in *Estate of King*⁹⁶ decided in 1952. The court was asked to decide whether a joint tenant who murders his cotenant can acquire the cotenant's interest by survivorship. Based more upon public policy considerations than property law, the court by a 4-3 decision declined to permit a wrongdoer to profit by his crime and held that the joint tenancy became inoperative at the moment of the death of the murdered joint tenant. He retained what he had but gained nothing in addition. Since the murdered wife's right as a joint tenant could not be deprived by an illegal act of the husband it remained in existence and became operative when husband died shortly after as a result of suicide. What strange tenancy would have resulted had the husband survived for a period of years is not clear. The dissent written by Justice Currie seems to the writer sounder and more logical. It takes the position that murder operates as a severance resulting in a tenancy in common whereby the murderer retains ownership of an undivided one-half but gains no title or enjoyment of the other half.⁹⁷

The less difficult problems of severance were easily settled by application of common law principles. Clearly a conveyance by one joint tenant of his interest to another will sever the tenancy and will create, as between the grantee and the remaining joint tenant, a tenancy in common.⁹⁸ Few cases involving property law have caused the consternation among members of the bar which followed the decision in *Will of Schaech*.⁹⁹ The axiomatic principle that a joint tenancy interest could not be devised received a rather severe jolt. The initial reaction to the *Schaech* case was that it changed joint tenancy law. However, while it had a profound effect in that it pointed a way in which a deceased joint tenant may by his will affect the survivorship incident, nevertheless the case was consistent with property law.¹⁰⁰

An interesting case of severance involving a conveyance by one joint tenant is *Campbell v. Drozdowicz*.¹⁰¹ The husband who owned property in joint tenancy with his wife conveyed his interest to her in fraud of his creditors, and then died. The question arose as to whether

⁹⁶ 261 Wis. 266, 52 N.W.2d 885 (1952).

⁹⁷ See also *Estate of Jafuta*, 268 Wis. 258, 67 N.W.2d 286 (1954) in which the court sustained a trial court finding that the surviving wife did not cause her husband's death and denied an attempt by the husband's estate to recover joint property on the rule of the *King* case.

⁹⁸ *Wallace v. St. John*, 119 Wis. 585, 97 N.W. 193 (1903). Wherein a devise by one joint tenant of his interest is inoperative to create any interest in the devisee. *Bassler v. Rewodlinski*, 130 Wis. 26, 109 N.W. 1032 (1906). *Siegel v. Clemons*, 266 Wis. 369, 63 N.W.2d 725 (1954).

⁹⁹ 252 Wis. 299, 31 N.W.2d 614, 33 N.W.2d 319.

¹⁰⁰ See notes in 32 MARQ. L. REV. 230; 49 Wis. L. REV. 817; 25 A.L.R.2d 1001, 1005.

¹⁰¹ 243 Wis. 354, 10 N.W.2d 158 (1943).

a judgment which a creditor had recovered against the husband subsequent to the conveyance (though the action was commenced prior) was a lien on the husband's interest in the property enforceable after his death. The court held that it was an enforceable lien; that the husband's voluntary conveyance to a joint tenant destroyed the unity of title and severed the joint tenancy terminating the right of survivorship. The fact that as to creditors the conveyance is void does not recreate the joint tenancy as between the parties since the conveyance as between them is good. The creditor's action is not in a strict sense a setting aside of a conveyance but rather an establishment of the creditor's lien prior and superior to the rights of the grantee.¹⁰²

The soundness of the reasoning as well as the result in the *Campbell* case is questionable. The court has devised a protection for the creditor which was never contemplated by THE FRAUDULENT CONVEYANCE ACT. As a result of this case the creditor's rights are not only protected, but a fraudulent conveyance is now a means of enlarging them. If no conveyance had been made, the debtor's interest would have passed on his death by survivorship and the creditor, not having executed the judgment prior to the debtor's death, would have no remedy. Making the concessions that the court does, that fraudulent conveyance is valid between the parties, and the Act does no more than to impose a lien against the grantor's interest, it is difficult to see the importance of the severance argument on which the case was decided. The grantor's interest on which the lien is effected by the statute was a joint tenancy interest which has since been terminated by his death. It would seem that setting aside the conveyance could certainly give the creditor no greater protection than to restore the original situation.

Whether a contract to sell his interest in property by one joint tenant is a severance has never been squarely decided in Wisconsin though it was recognized by the court in *Kurowski v. Retail Hardware Mutual Insurance Co.*¹⁰³ that in equity such a contract may effect a severance although it doesn't at law.¹⁰⁴ In that case, however, the joint tenant contracted to convey the entire property, not only his interest, to a partnership of which he was a member. Subsequently the other joint tenant, his wife, died. The question arose when the suit was brought by the partnership to recover on a fire insurance policy. The insurance company claimed that the partnership was not the unconditional and sole owner as required by the policy. The court held that the contract of sale did not effect a severance even in equity because it was a con-

¹⁰² Cf. *Szymczak v. Szymczak*, 306 Ill. 541, 138 N.E. 218 (1923). To the effect that a valid deed by a joint tenant severs the tenancy and a subsequent reconveyance by the grantees to such joint tenant would not reestablish the joint tenancy—unity of title could not be restored.

¹⁰³ 203 Wis. 644, 234 N.W. 900 (1931).

¹⁰⁴ See 33 C.J. 908, Note 14.

tract to convey the entire property and not his interest and a severance was not intended or contemplated. Since there was no severance, the grantor took the whole property by survivorship at the death of his wife, and the partnership being in possession under an oral contract so far executed as to entitle it to specific performance is an unconditional and sole owner within the meaning of the insurance policy.

The same issue was up before the court in one other case¹⁰⁵ where the husband contracted to convey a small portion of property which he was in possession of under a land contract in joint tenancy with his wife. He then refused to perform and the grantee of this small portion sued for specific performance. The effect of the contract was never discussed by the court because the grantor joint tenant claimed the land as a part of his homestead and the contract under the homestead statute¹⁰⁶ was void without his wife's signature.¹⁰⁷

A land contract signed by both joint tenants does not constitute a severance of the joint estate.¹⁰⁸ Where one of the joint tenants unsuccessfully claimed that her signature was procured by fraud and attempted to have the land contract set aside upon the death of her husband, the court held that she succeeded to his interest and was bound by the land contract in which she joined of her own free will.

The question of common law as to the effect of a judgment lien on a joint tenancy has been effectively settled in Wisconsin by decision and statute. The mere docketing of a judgment against one joint tenant will not effect a severance of the tenancy.¹⁰⁹ In the *Musa* case the result of this rule was that a judgment creditor could not enforce his lien against joint tenancy property after the death of the judgment debtor.

In 1945, §230.455, Wis. STATS. was enacted;¹¹⁰ it provided that no

¹⁰⁵ *Eaton Center Coop. v. Kalkofen*, 209 Wis. 170, 244 N.W. 620 (1932).

¹⁰⁶ Wis. STATS. (1955) §235.01.

¹⁰⁷ See also *Tupitza v. Tupitza*, 251 Wis. 257, (1947) in which the court held that a quitclaim deed of a homestead by the husband alone was void and did not sever the joint tenancy. Such a deed the court held was absolutely void under the statute.

¹⁰⁸ *Simon v. Chartier*, 250 Wis. 642, (1947).

¹⁰⁹ *Musa v. Segelke & Kohlhaus Co.*, 224 Wis. 432, 272 N.W. 657, 111 A.L.R. 168 (1937). But the court leaves open the question of what the effect of a levy of execution would have as far as severance is concerned.

¹¹⁰ LAWS 1945, Ch. 549. Sec. 230.455. "No real estate mortgage, chattel mortgage, conditional sales contract, lien effected pursuant to the provisions of chapter 289 or other lien or charge upon the joint tenancy interest of a joint tenant to any joint tenancy shall not (sic) defeat the right of survivorship in such joint tenancy, but the joint tenancy interest of such joint tenant to which upon his death the surviving joint tenant succeeds shall be subject to such real estate mortgage, chattel mortgage, conditional sales contract, lien effected pursuant to the provisions of chapter 289 or other lien or charge. All judgments, certificates, or decrees of courts of competent jurisdiction heretofore entered terminating joint tenancies or assigning such property under a will or an administration of the estate of any such beneficiary shall be binding upon all interested parties 2 years after the passage and publication of this amendment unless within said 2 year period application is made to such court to set aside or modify such judgment, certificate, or decree."

liens of any kind shall defeat the right of survivorship but that the joint tenancy interest shall be subject to the lien and be enforceable against that interest even after the death of the joint tenant. A two year period was allowed in which previous judgments, certificates and decrees terminating joint tenancies may be set aside or modified.

The ambiguity of the language "or other lien or charge" left considerable doubt as to the legislative intent. Subsequent amendments of the section eliminated those words¹¹¹ and limited its application to the liens now enumerated therein.¹¹²

Old age assistance liens have been specifically provided for in Wis. STATS. (1955) §49.26 (5).¹¹³ The original section was amended in 1945 to clarify the doubt raised in *Goff v. Yauman*.¹¹⁴ The lien is given the same effect as those in §230.455. In the *Goff* case such a result was reached but not without difficulty because the statute as it then stood did not clearly set forth what effect the lien should have upon joint tenant interests.

To reach the result of preserving the lien the court held that the joint tenant's voluntary act of subjecting the land to the lien severed the joint tenancy. The question was presented to the court again in 1953 in *Estate of Feiereisen*.¹¹⁵ The court recognized that while it might have reached the same result in the *Goff* case without finding a severance, it did not do so. It declined to disturb the ruling of that case upon which many courts have relied in assigning real estate in probate proceedings and held that a lien perfected prior to the 1945 statutory change severed the joint tenancy and a tenancy in common resulted.

A comparable statutory lien was created with respect to care furnished veterans at Grand Army home at King.¹¹⁶

The court in dicta in the *Goff* case¹¹⁷ raised the issue of whether a

¹¹¹ LAWS 1949, Ch. 364; LAWS 1955, Ch. 251.

¹¹² Wis. STATS. (1955) §230.455: "No real estate mortgage, chattel mortgage, conditional sales contract, lien effected pursuant to s. 45.37 (3m), ch. 49 and ch. 289 upon the joint tenancy interest of a joint tenant to any joint tenancy shall defeat the right of survivorship in such joint tenancy, but the joint tenancy interest of such joint tenant to which upon his death the surviving joint tenant succeeds shall be subject to such real estate mortgage, chattel mortgage, conditional sales contract, lien effected pursuant to s. 45.37 (3m), ch. 49 and ch. 289.

¹¹³ Wis. STATS. (1955) §49.26 (5). "Upon such filing the lien herein imposed attaches to all real property of the beneficiary including a house trailer used as an abode presently owned or subsequently acquired (including joint tenancy and homestead interests) in any county in which such certificate is filed . . . Such lien shall not sever a joint tenancy nor affect the right of survivorship except that the lien shall be enforceable to the extent that the beneficiary had an interest prior to his decease."

This section originally §49.26 (4) enacted in 1937, was renumbered and amended by Ch. 549, Wis. LAWS 1944-45, and by Ch. 588 §7, Wis. LAWS 1945.

¹¹⁴ 237 Wis. 643, 298 N.W. 179, 134 A.L.R. 952 (1941).

¹¹⁵ 263 Wis. 53, 56 N.W.2d 513 (1953).

¹¹⁶ Wis. STATS. §45.37 (3m) created by LAWS 1955 ch. 251.

¹¹⁷ 237 Wis. at p. 649.

mortgage by one of the joint tenants would sever a joint tenancy but declined to decide that question. It was solved by the enactment in 1945 of §230.455¹¹⁸ which provided that no mortgage shall defeat the right of survivorship but, on the other hand, survivorship shall not defeat the lien of the mortgage. By amending §§230.47 and 230.48¹¹⁹ concerning certificates of termination, provision was made for the inclusion in the administrator's or executor's inventory the decedent's interest in any property owned in joint tenancy and an adjudication of rights of all interested parties.

It will be noted that §230.455 produces a rather unfair result as to the tenant against whom no lien has been created. His right of survivorship has been reduced in value to the extent of the lien on his cotenant's interest, yet no corresponding reduction is made in the survivorship rights of the debtor cotenant. The statute permits one tenant to defeat completely his cotenant's right of survivorship, while protecting the debtor tenant's survivorship rights in the unencumbered share. The question undoubtedly was one of policy which the legislature resolved in favor of creditors. There is left to the joint tenant who created no lien two alternatives, either to encumber his own interest equally or, on the theory of "half a loaf," to effect a severance and secure to himself, in at least a portion of the property, an estate in severalty.

Although the legislature has resolved some of the problems of severance, there still remain a few which have not been decided by the Wisconsin court and have not been provided for by statute. Whether a contract of sale by one joint tenant of his interest in land or other property,¹²⁰ or a lease for years by a joint tenant of his interest in a joint tenancy held in fee¹²¹ are acts which will sever the tenancy; or whether a severance is effected by a levy of execution or not until sale on execution¹²² are some of the undecided problems. Neither the court nor the legislature has shown any great feeling against the doctrine of survivorship. It appears from the cases dealing with severance that the court will be slow in reaching the result that a severance has occurred,

¹¹⁸ *Supra*, note 112.

¹¹⁹ WIS. STATS. (1955) §230.47. "(1) . . . Whenever one joint tenant in any real estate has died or may hereafter die leaving surviving his cotenant, upon application . . . the court judge may issue, . . . a certificate, setting forth the fact of the death of . . . such joint tenant, . . . and . . . the right of survivorship of any joint tenant . . . (2) An administrator or executor shall include in his inventory the interest which the decedent owned as such joint tenant . . . before his death. The county court shall adjudicate in the final judgment or order for assignment regarding the termination of such joint tenancy . . . and regarding such other facts as are essential to a full and final determination of the rights of the parties interested."

§230.48 is similar to §230.47 in wording and deals with termination of joint tenancy in personal property.

¹²⁰ See 39 MARQ. L. REV. 116; also see *supra*, p. 108, *Kurowski v. Retail Hardware Mut. Ins. Co.*, 203 Wis. on p. 647.

¹²¹ See 39 MARQ. L. REV. 115; *Musa v. Segelke & Kohlhaus Co.*, 224 Wis. at p. 437.

¹²² See 39 MARQ. L. REV. 116.

and only when clearly obliged to do so.¹²³ It would seem likely that the court will hold that a lease for years will not effect a severance of a joint tenancy held in fee; that levy of execution is not sufficient to effect a severance but that a sale only will have that result; that a land contract by one joint tenant, barring special equities on which to base a different rule, would effect a severance—but the court would probably have no difficulty, nor reluctance to find special equities.

III.

Modern economic and political conditions have created problems in joint tenancy that have no foundation in the common law. The statutory homestead exemption enacted to afford a degree of protection for debtors has had its effect on joint tenancies, joint bank accounts have created special problems and federal and state statutes taxing joint tenant interests have resulted in unlimited complexities. Some observations will be made in this article on the first two problems, however, no attempt will be made to review matters of taxation as they relate to joint tenancies.^{123a}

A.

In Wisconsin, the homestead laws have had an active legislative history¹²⁴ the homestead "estate" or "interest"¹²⁵ has a constitutional foundation¹²⁶ and takes the form of an exemption¹²⁷ as well as a devisable¹²⁸ and descendible¹²⁹ interest. The primary purpose of the homestead statutes is to protect the home from seizure and forced sale.¹³⁰ The new interests thus created in the property specified by the statutes are known as homestead estates or interest. This estate in some jurisdictions, notably California, has been declared by statute to be an estate in joint tenancy where the homestead declaration is made by a married person.¹³¹

Most states, among them Wisconsin, refuse to designate homestead as an estate,¹³² yet a kind of joint interest is created by the statutes: a

¹²³ See for example the Kurowski Case, *supra*, note 120.

The following language of the court certainly does not bespeak hostility to the doctrine of survivorship: "We are unable to perceive why in equity the agreement should be held to effect a severance when the circumstances all indicate that such effect could not have been intended or contemplated." See also *Musa v. Segelke & Kohlhaus Co.*, *supra* note 121. *Estate of King*, *supra* note 96. *Simon v. Chartier*, *supra* note 108. *Kelberger v. First Federal*, *supra* note 59.

^{123a} See NEMMERS, *Wisconsin and Federal Taxation of Joint and Common Interests in Property*. 52 WIS. L. REV. 91.

¹²⁴ Crow, *The Wisconsin Homestead Exemption Law*, 20 MARQ. L. REV. 1 (1935).

¹²⁵ WIS. STATS. (1955) Sec. 990.01(13), (14); 235.01 (2), (3).

¹²⁶ WIS. CONST. Art. I, Sec. 17.

¹²⁷ WIS. STATS. (1955) §272.20 (1).

¹²⁸ *Ibid.*, §238.04.

¹²⁹ *Ibid.*, §237.02.

¹³⁰ *Platto v. Cody*, 12 Wis. 461, (1860) at pp. 464-5.

¹³¹ FREEMAN, *op. cit.*, §47, 48.

¹³² *Ibid.*, §51; see *infra* note 136.

conveyance cannot be made by one without the consent of the other;¹³³ the interest vests in the survivor, still free from execution.¹³⁴ The interest, however, does not attain the dignity of an estate:

"The estate rests where it existed before the premises were appropriated as a homestead. The appropriation of them confers a right upon the wife to insist that their character as a homestead shall continue until she consents to alienation, or another homestead is acquired, or they are otherwise abandoned. The wife, if surviving her husband, takes the homestead, not by virtue of any right of survivorship arising from the alleged joint tenancy, but as property set apart by law from her husband's estate, for her benefit and that of her children, if any."¹³⁵

In *Godfrey v. Thornton*¹³⁶ the court discussed the issue exhaustively and concluded that the statute gives the wife no estate by imposing a disability upon the husband in conveying homestead property, but only gives her a personal control over him in the alienation of his own estate.

The rule seems clear in Wisconsin that the homestead statutes do not create a joint tenancy in the husband and wife. Not so clear is the Wisconsin rule on the other homestead problem in which the question of joint tenancy is important. That problem is whether homestead rights can attach to undivided interests in lands, in the absence of express statutes permitting it.¹³⁷ Wisconsin answered this question early in the leading case of *West v. Ward*:¹³⁸

"A careful examination of the homestead law seems to lead necessarily to the conclusion, that an undivided interest in real estate is not as such susceptible of such an ownership and occupancy as the law contemplates in order to constitute a homestead . . . The occupancy, in order to constitute a homestead, must be of some specific portion, capable of being set apart by metes and bounds and thus separated from that which is not exempt."

The majority of jurisdictions, however, refused to distinguish between estates in severalty and in cotenancy, in regard to homestead rights, because of the remedial character of the acts and a consequent liberal construction.¹³⁹ In 1878, the statute was amended to provide that the

¹³³ WIS. STATS. (1955) §235.01.

¹³⁴ *Ibid.*, §237.025.

¹³⁵ *Gee v. Moore*, 14 Calif. 472 (1859)—decided before the enactment of the California statute declaring homesteads joint tenancies.

¹³⁶ 46 Wis. 677, 1 N.W. 362 (1879). In accord, *Town v. Gensch*, 101 Wis. 445, 76 N.W. 1096, 77 N.W. 893 (1899); *Beranek v. Beranek*, 113 Wis. 272, 89 N.W. 146 (1902); *Mach v. Bloom*, 126 Wis. 385, 105 N.W. 831 (1905); "During the husband's life he is the absolute owner and possessor of the homestead, and the effect of our statutes is no more than to impose a limitation upon his right to convey or encumber it, but in no wise to create a concurrent estate or possession in the wife." at p. 389.

¹³⁷ FREEMAN, *op. cit.*, p. 111.

¹³⁸ 26 Wis. 579 (1870) at p. 580.

¹³⁹ Anno. 89 A.L.R. 511 at p. 540; Note, 40 HARV. L. R. 321 (1927).

exemption extended to land owned by husband and wife jointly or in common and to the interest therein of tenants in common, having a homestead thereon with the consent of the other cotenants.¹⁴⁰ Except for minor changes in wording, the present statute contains the same provision.¹⁴¹

The statutory change was recognized in *Zimmer v. Pauley*¹⁴² where the husband owned land as a tenant in common with another party.¹⁴³ It is difficult, however, to reconcile with the statute the following statement in *Cornish v. Fries*¹⁴⁴ decided in 1889: "A homestead cannot be jointly held with another,"¹⁴⁵ citing *West v. Ward*.¹⁴⁶ It is possible that the court overlooked the statute, as no reference is made to it. Since the statement was dicta merely and had no immediate bearing on the outcome of the case, it might be ignored. On the other hand, if properly limited, the statement is not incorrect. The statute provides for a homestead (as to cotenant interests) in land owned by husband and wife jointly or in common, but as to all others only in common; thus a person holding in joint tenancy with another, not his wife would not come within the statute. The rule of *West v. Ward* would undoubtedly apply to that situation.

An interesting problem arising out of the statutory limitation on the amount of homestead exemption, which has never been decided by the Wisconsin Supreme Court, is presented by the case of a homestead in land held jointly by husband and wife. Where a home is held in joint tenancy and its value is \$10,000, should the husband be entitled to claim the full \$5,000 statutory exemption? If a judgment is recovered against the wife may she claim any exemption? Does it make any difference whether the husband has previously made a homestead claim? Or is the home the homestead and would each be allowed to claim \$5,000 exemption? or \$2,500?

Clearly the benefit of the homestead provisions is available only to such persons as are within the contemplation of the statute. The Wisconsin statute, Sec. 272.20 (1), allows an exemption of \$5,000 to a "resident owner,"¹⁴⁷ and technically, both the husband and wife are resident owners of the home in their own right, and are entitled by law to the possession of the whole estate. Shouldn't they both be entitled to claim the full exemption under the statute?

¹⁴⁰ WIS. R. S. 1878, §2983.

¹⁴¹ WIS. STATS. (1955) §272.20 (1).

¹⁴² 51 Wis. 282, 8 N.W. 219 (1881).

¹⁴³ Accord: *Bartle v. Bartle*, 132 Wis. 392, 112 N.W. 471 (1907) (tenants in common); *Reeves and Co. v. Saxton*, 145 Wis. 10, 129 N.W. 784 (1911) (life tenant and remainderman).

¹⁴⁴ 74 Wis. 490, 43 N.W. 507 (1889).

¹⁴⁵ *Ibid.* at p. 496.

¹⁴⁶ *Supra*, note 138.

¹⁴⁷ WIS. STATS. (1955) §272.20 (1) "An exempt homestead as defined in s. 990.01 (14) selected by a resident owner and occupied by him shall be exempt from executions"

It is well settled that as between the husband and wife, it is the husband who has the right of selection and power of abandonment.¹⁴⁸ This right of selection has no relation to value—the husband does not say, “I select \$5,000 worth of this building as my homestead.” The home regardless of its value is designated the homestead. Thus if each is a resident owner of the homestead, it would seem that each is entitled to the full exemption. The Wisconsin statute is not restricted to the “head of the family” or a “householder with a family” as in many states.¹⁴⁹ It was early decided that a single man may have a homestead.¹⁵⁰ The statute requires only that the person claiming the exemption be a resident owner, occupying the property specified in the statute. It has been held that right of occupancy is also essential to homestead rights, so that a remainderman, although in occupancy or living on the premises with the consent of the life tenant, cannot claim a homestead.¹⁵¹ Thus if a husband and wife own a homestead either jointly or in common, and continue to live together therein, each could claim an exemption. So, also, would seem the rule if two strangers owned a house and lot in common and both occupied the house as their homestead.

This conclusion seems further strengthened by the fact that before the 1935 amendment¹⁵² which employs the language in the current statute, the statute read:

“... Such exemption shall extend to land *not exceeding altogether the amount and value aforesaid*, owned by a husband and wife jointly or in common and to the interest therein of a tenant in common or two or more tenants in common, having a homestead thereon, with the consent . . .”¹⁵³ (Italics added)

It appears that the italicized words were intended to limit the total exemption to \$5,000 value even where property was held by a husband and wife in cotenancy. The omission of this provision in the amendment would indicate that no such limitation was intended thereafter.

All this, of course, is in the realm of speculation, and the conclusions are the author's own. Other arguments are certainly tenable: that the husband alone should be allowed the exemption; that the intention of the legislature is to exempt a home up to \$5,000 and no more, and to permit both to claim would defeat that intent; that each should be entitled to an exemption of \$2,500. It has been said that

¹⁴⁸ *Warsco v. Oshkosh Savings & Trust Company*, 190 Wis. 87, 208 N.W. 886 (1926). *Krueger v. Groth*, 190 Wis. 387, 209 N.W. 772 (1926). *Hainz v. Kurth*, 227 Wis. 260, 278 N.W. 413 (1938).

¹⁴⁹ 29 C.J. 791.

¹⁵⁰ *Myers v. Ford*, 22 Wis. 139 (1867); *Estate of Fish*, 214 Wis. 464, 253 N.W. 387 (1934).

¹⁵¹ *Estate of Fish*, *supra*; *Reeves and Co. v. Saxton*, *supra* Note 21; *Cornish v. Frees*, *supra* note 22.

¹⁵² LAWS 1935, ch. 541, §232.

¹⁵³ WIS. STATS. (1933) §272.20(1).

"Where a husband has claimed a homestead the wife cannot claim another in a separate property during his life; nor can a husband who has a homestead in his wife's land claim another in his own land."¹⁵⁴

But where the land is jointly owned would such rules apply?

In 1953 this question was presented to the United States District Court for the Eastern District of Wisconsin in the bankruptcy matter *In re Blodgett*.¹⁵⁵ The bankrupt owned a homestead in joint tenancy with his wife. It was appraised at \$16,000. The referee ordered that the house be sold; that a mortgage of \$5,100 be paid; that \$5,000 be set aside to the bankrupt and his wife for the exemption; and that of the balance, $\frac{1}{2}$ be held for creditors and $\frac{1}{2}$ be paid to the wife for her share as tenant in common. Judge Tehan, in a sharply analytical opinion, decided two questions: (1) whether the court had authority to order a sale of the homestead which was jointly owned. He held that the vesting of the title to the bankrupt's interest in the property in the trustee severed the joint tenancy and the trustee and the wife were tenants in common. (2) Whether the bankrupt is entitled to a \$5,000 exemption out of his interest alone. On this point the court decided that he was. Section 272.20, said the court, referred to joint tenancy only as a type of estate in land that may constitute a homestead and was not intended to designate who may claim the homestead right, nor to place any further restrictions upon the right as to value or otherwise. After reviewing the homestead statutes and recognizing that there were no Wisconsin cases covering the point, the court's analysis led it to the conclusion that the husband was a resident owner within the meaning of the statute and allowed him a full \$5,000 exemption. It declined to decide whether the wife is also entitled to a full exemption in her own right. The court concludes with an observation long advocated by lawyers that the legislature might with profit re-examine the homestead statutes in the light of present day conditions.

*Radtke v. Radtke*¹⁵⁶ dealt with another interesting joint tenancy-homestead situation. It has been well settled that the husband has it in his power to abandon property as his homestead and because of the wife's duty to follow her husband, he can thereby defeat the right which the wife theretofore had to veto the sale of the homestead property,¹⁵⁷ or, as in the supposed situation above, to be in a position to claim an exemption. It is also well settled that where a wife leaves the homestead because of the husband's ill-treatment of her, she loses no rights

¹⁵⁴ 29 C.J. 790.

¹⁵⁵ 115 Fed. Supp. 33 (Sept. 16, 1953).

¹⁵⁶ *Radtke v. Radtke*, 247 Wis. 330, 19 N.W. 169 (1944).

¹⁵⁷ *Krueger v. Groth*, *supra* note 148.

and forfeits none of the immunities and privileges 'to which she is entitled by law.'¹⁵⁸

In the *Radtke* case, the wife left the homestead, which she owned in joint tenancy with her husband, because of the husband's ill-treatment; he continued to reside there for seven years and then went to a hospital with incurable cancer. A month later he conveyed his interest to his three children, without his wife's signature. The court held that there was an abandonment of the homestead by the husband; that the sale after the abandonment severed the joint tenancy. The court gave no indication of having considered the problem of the wife's having left because of the husband's acts, in the light of the *Barker* and the *Keyes* cases. Yet in the latter case the husband had clearly abandoned the homestead before sale—the court said in its recital of the facts:

"The court finds that neither of the parties ever lived in the house after the 1st of March, 1880, and that it was no longer actually occupied as a homestead by either of them."¹⁵⁹

The husband's sale sometime during March, 1880, was held void as between himself and his wife. The rule in the *Radtke* case seems to be a preferable one in the absence of any evidence of bad faith on the part of the husband in the act of abandonment.¹⁶⁰

B.

No attempt will be made to discuss exhaustively the multitude of problems that have arisen out of joint bank accounts.¹⁶¹ Few legal relations have caused the courts more difficulty in their attempts to apply existing rules of law in governing the relationship of the parties involved. In the typical situation one individual either makes a deposit in the name of himself and another, or having an existing account, changes it to his name and another's. This action is usually accompanied by the signing of cards and other expressions of intention to make the account payable to either or the survivor. The "donee" depositor may or may not participate in these transactions.

Some of the difficulties are immediately apparent: What is the intention of the depositor in creating the joint account? If an intention to make a gift to the "donee" depositor can be spelled out, what delivery is necessary to complete the gift? If the gift is sustained, what is the relationship between the depositors? If the gift cannot be sustained, on

¹⁵⁸ *Barker v. Dayton*, 28 Wis. 367 (1871); *Keyes v. Scanlon*, 63 Wis. 345, 23 N.W. 570 (1885).

¹⁵⁹ *Keyes v. Scanlon*, 63 Wis. at p. 348.

¹⁶⁰ The rule was reaffirmed in the recent case of *Siegel v. Clemons*, 266 Wis. 369, 63 N.W.2d 725 (1954).

¹⁶¹ On this subject see Annotation in 48 A.L.R. 189; 66 A.L.R. 881; 103 A.L.R. 1123; 135 A.L.R. 993; 149 A.L.R. 879. HEMINGWAY, *Joint Tenancy in Bank Accounts*, 10 CHI. KENT L. R. 37 (1931); KATZENSTAIN, *Joint Savings Bank Accounts in Md.*, 3 MD. L. R. 109 (1939); SLATER, *Joint Accounts and Trusts Created by Bank Deposits*, 2 BKLYN L. R. 27 (1932).

what other theory can the intention of the depositor be given effect? What relationship would result therefrom? What is the effect of statutes dealing with joint accounts?

On none of the issues is there agreement among the courts. In regard to intention, in some states a mere deposit to the account of the owner "and" another or the owner "or" another will raise a presumption of a gift.¹⁶² In the majority of jurisdictions a clearer showing of an intention to create a present interest in the "donee" depositor is required.¹⁶³ It is not uncommon to find that the joint account was set up by the owner for the convenience of enabling the co-depositor to draw therefrom for the benefit of the owner without further express authorization.¹⁶⁴

If the court concludes that the owner intended to make a gift, it becomes important to inquire whether he intended it to take effect at his death, whether it was a gift *causa mortis* or whether the donor intended to create a present interest in the donee. It is of further importance whether he intended to divest himself of all beneficial interest or to retain an interest in himself. It is this latter situation that creates the greatest difficulty, for it is necessary to inquire further into the interest the donor wished to create in the donee and to retain in himself. The intention may be to allow either person to draw from the account for his own personal use without accounting to the other. It will be noted that with this arrangement the donor has the power of withdrawing the entire deposit and defeating the gift; since this power conflicts with the rule applicable to gifts that the donor must divest himself of all control over the gift, many courts have held that the gift must fail.¹⁶⁵ The majority, however, hold that if the intention of the donor is to vest a present right in the donee to share in the deposits constituting the joint account, such a gift can be sustained.¹⁶⁶ On the other hand, the intention may have been to create a joint tenancy in himself and the donee. In that event, neither party can appropriate all or any part of the account for his sole benefit, nor destroy the estate of the other. While such a result would meet the rule applicable to gifts, the difficult question is whether a joint tenancy can be created in this manner. A conveyance or gift from one to himself and another lacks the unities of time and title which are essential to the creation of a joint tenancy.¹⁶⁷

¹⁶² 7 AM. JUR. 302; 48 A.L.R. 19; L.R.A. 1917C 556, Note 20 *et seq.*; also annotations at Note 161 *supra*.

¹⁶³ 7 AM. JUR. 302; 48 A.L.R. 191; see also Note 161 *supra*.

¹⁶⁴ 48 A.L.R. 191, note 11; 7 AM. JUR. 301; *Marshall and Hsley Bank v. Voigt*, 214 Wis. 27, 252 N.W. 355 (1934); *Plainse v. Engle*, 262 Wis. 506, 56 N.W.2d 89, 57 N.W.2d 586.

¹⁶⁵ 7 AM. JUR. 304; L.R.A. 1917C 564, Note 49; 48 A.L.R. 200; see *supra* note 161. See *Dent. of Taxation v. Berry*, 258 Wis. 544, 46 N.W.2d 757 (1951).

¹⁶⁶ 7 AM. JUR. 304; 48 A.L.R. 200; see *supra* note 161.

¹⁶⁷ *Supra*, p. 101.

Nor are the courts likely to deal with the transaction as analogous to a conveyance to a third person (the bank) and a reconveyance back to the co-depositors in joint tenancy.¹⁶⁸ Nevertheless, some cases hold that a clear intention embracing the essential elements of joint ownership and survivorship will be given effect.¹⁶⁹

But with all the expressions of intention, in most jurisdictions delivery is still essential to complete the gift. As to what constitutes a sufficient delivery of such a gift the cases are in hopeless conflict. The delivery of a pass book or certificates of deposit to the donee is given varying effect.¹⁷⁰ Some courts sustain the gift without reference to the technical requirements of delivery.¹⁷¹

In many cases where a court has been unable to sustain the title of the co-depositor on the gift theory, it has done so on a trust theory,¹⁷² eliminating the element of delivery and the objection of donor control. The requirement of an unequivocal declaration of trust is still present to plague the court, but the words "in trust" are not essential to that declaration.¹⁷³

A different approach, originating in Massachusetts¹⁷⁴ and known as the contract theory has gained rather widespread recognition. In the application of this rule, the contract with the bank renders unnecessary a consideration of the elements of gift, trust or joint tenancy. The co-depositor is treated as a party to the contract with the bank, and by virtue of the contract entitled to the deposits on the death of the original owner. Other states reach the same result by analogy to third party beneficiary contracts. The transfer involves not a gift of the deposit but a gift of the interest therein created by the contract. No delivery is necessary since the contract supplies the formalities necessary to render the gift effective.¹⁷⁵ Even under this theory, however, the problems involving intention are present, and it is necessary to show that the original depositor intended to create an interest in the co-depositor or beneficiary. The contract may be evidence of intention or may even create a presumption of gift, but it should not preclude a showing that the deposit was made in this form for other purposes.¹⁷⁶

In many jurisdictions statutes have been enacted with varying effects.¹⁷⁷ The statutes, it seems, were originally intended to protect banks in honoring withdrawals by one of two joint depositors on the

¹⁶⁸ 7 AM. JUR. 308; 66 A.L.R. 893.

¹⁶⁹ 7 AM. JUR. 308; 48 A.L.R. 203, Note 73; also annotation *supra* note 161.

¹⁷⁰ 48 A.L.R. 200, notes 51 *et seq.*; *supra* note 161.

¹⁷¹ 7 AM. JUR. 302.

¹⁷² 7 AM. JUR. 306; 48 A.L.R. 202; 66 A.L.R. 890; 103 A.L.R. 1132; *supra* note 161.

¹⁷³ 7 AM. JUR. 306, note 17.

¹⁷⁴ *Chippendale v. North Adams Sav. Bk.*, 222 Mass. 499, 111 N.E. 371 (1915); *Perry v. Leveroni*, 252 Mass. 390, 147 N.E. 826 (1925).

¹⁷⁵ *Goldston v. Randolph*, 293 Mass. 253, 199 N.E. 896 (1936) at p. 257.

¹⁷⁶ 7 AM. JUR. 308; *Estate of Staver*, 218 Wis. 114 p. 121.

¹⁷⁷ 48 A.L.R. 194 *et seq.*; 103 A.L.R. 1133 *et seq.*

other's death.¹⁷⁸ The New York act¹⁷⁹ is typical of these statutes involving joint accounts:

"When a deposit shall be made by any person in the names of such depositor and another person and in the form to be paid to either or the survivor of them, such deposits and any additions thereto made by either of such persons after the making thereof shall become the property of such persons as joint tenants, and the same, together with all dividends thereon, shall be held for the exclusive use of such persons, and may be paid to either during the lifetime of both or to the survivor after the death of one of them, and such payment and the receipt or acquittance of the one to whom such payment is made shall be a valid and sufficient release and discharge to such savings bank for all payments made on account of such deposit prior to the receipt by such savings bank of notice in writing not to pay such deposit in accordance with the terms thereof. The making of the deposit in such form shall, in the absence of fraud or undue influence, be conclusive evidence in any action or proceeding to which either such savings bank or the surviving depositor is a party, of the intention of both depositors to vest title to such deposit and the additions thereto in such survivor."

The New York court has established the rule that once the intention of the depositor to create a joint tenancy is established, then under the statute there is a conclusive presumption that title to any money left in the account on the death of one of the tenants passes to the survivor, but that as to money withdrawn by either party during his lifetime, the presumption doesn't apply and evidence is admissible to show that no joint tenancy was originally intended.¹⁸⁰ The same effect is given similar statutes in other states.¹⁸¹

In Wisconsin, the court had the problem presented in *Dupont v. Jonet*¹⁸² and adopted the gift theory. "No reason is perceived," said the court,

"why a husband may not deposit money in a bank and take a certificate therefor in the names of both himself and his wife, payable to either, and thus make a gift to her of an undivided interest in the fund, and create a tenancy by entireties therein. All that is necessary would seem to be that the gift be completed by transfer of the required possession of the thing given."¹⁸³

¹⁷⁸ 48 A.L.R. 197 note 35; *Marshall and Ilsley Bank v. Voigt*, *supra*, at p. 33; "§221.45 Stats., which provides that withdrawals may be paid by banks to either one of two persons, whether the other be living or not, (etc.) . . . does not alter the law. . . . The purpose and effect of that statute are to render legally effective receipts and acquittances given to a bank upon its payment of a deposit to either of the persons. . . ."

¹⁷⁹ N.Y. BANKING LAW, §249 subd. 3 (N.Y. LAWS 1914 ch. 369).

¹⁸⁰ *Moskowitz v. Marrow*, 251 N.Y. 380, 167 N.E. 506 (1929); *Marrow v. Moskowitz*, 255 N.Y. 219, 174 N.E. 460 (1931); *Re Porianda*, 256 N.Y. 423, 176 N.E. 826 (1931).

¹⁸¹ 103 A.L.R. 1136 *et seq.*

¹⁸² *Supra*, note 33.

¹⁸³ *Ibid.* at p. 560.

The placing of the certificates in a box to which both parties had access was deemed to constitute sufficient delivery. The court ignores the question of unities in the creation of the tenancy. When the question arose again in the *Marshall and Ilsley Bank v. Voigt*,¹⁸⁴ the court reaffirmed the gift theory in holding that, since there never was a delivery of the pass books to the donee, there never was a completed gift of the deposits. The court also affirmed the lower court's findings that the donor had not intended to create a joint tenancy but merely established the joint account for his own convenience by giving the donee the right to make withdrawals therefrom for his benefit.

Then in *Estate of Staver*¹⁸⁵ the court departed from its previous rulings and espoused the contract theory.¹⁸⁶ The case involved certificates of deposit which the original owner had taken in the name of himself and another. The court, recognizing that the transaction failed to meet the requirements of a trust or of a gift, concluded that the question is not one of transfer at all.

"In case of joint bank accounts evidenced by certificates of deposit, the chose in action or contract claimed against the bank is at the outset created not only in the depositor but in the person whom he designates as joint payee or owner of the deposit. The delivery of the certificates or passbook which gives vitality and existence to the chose in action must create a legal interest and ownership both in the depositor and the third person directly. No question of transfer from the depositor to the intended donee is in any manner involved. The instrument in legal contemplation vests ownership in a chose in action according to its terms. The joint interest is perfected by the initial delivery, and no further transfer is required by the depositor."¹⁸⁷

This result could be defeated in equity by a showing that the purpose of the deposit was to constitute the payee other than the depositor a mere agent of the depositor, or that the deposit was made for his convenience. Such a showing would warrant affecting the legal title with a trust in favor of the equitable owner.

The rule of the *Staver* case has become firmly established in Wisconsin. It was applied by the court to savings bank accounts¹⁸⁸ sustained under constitutional attack¹⁸⁹ and cited with approval in many more.¹⁹⁰ Only in the *Kelberger*¹⁹¹ case has the court in applying the

¹⁸⁴ *Supra*, note 59.

¹⁸⁵ *Supra*, note 63.

¹⁸⁶ It would seem that the court will apply the contract theory to certificates of stock in which the joint interest is created in the same manner as certificates of deposit, since the court overruled *Breitenbach v. Schoen*, *supra*, p. 103.

¹⁸⁷ *Estate of Staver*, *supra*, at p. 120.

¹⁸⁸ *Estate of Skilling*, *supra*, note 59. No mention is made by the court of sec. 222.12 (9) STATS., which is identical with the New York statute discussed on page 120, *supra*.

¹⁸⁹ *Schwanke v. Garlt*, *supra*, p. 103.

¹⁹⁰ *Supra*, note 91; also *Central Wisconsin Trust Co. v. Schumacher*, 230 Wis.

rule thrown any doubt on the logical application of the contract theory. It should be noted, however, that the *Staver* case and those cases referred to above were concerned with the question of survivorship. What the relationship of the co-depositors is under the rule of the *Staver* case is not altogether clear. Whether the survivor takes the account because the parties were joint tenants or because the contract created a survivorship interest does not appear. That they are joint tenants is indicated in some of the language of the court.¹⁹² In *Tucker v. Simrow*¹⁹³ the court speaks of the contract creating an immediate present interest in the persons named as "joint tenants." On the other hand, the court speaks of the contract itself as determining the "scope, effect and vitality" of the joint chose in action.¹⁹⁴ In the *Schwanke* case,¹⁹⁵ where the attack was based on the application by the court of contract principles rather than the law of joint tenancy in personal property, the court asserted the right to abandon its view that joint tenancy rules governed transactions of this nature.

Not until 1953 was the court confronted with a problem of determining the rights of living joint owners of a savings account. In *Boehmer v. Boehmer*¹⁹⁶ the facts clearly established a joint account in the usual sense. Mr. Boehmer suffered a stroke and was adjudged incompetent. His son by a former marriage was named guardian. He demanded the bank book and when Mrs. Boehmer refused to give it to him, he convinced the bank to transfer the funds to a guardianship account. The trial court required the guardian to restore the funds to the joint account under the terms of which either party had the right to withdraw and on the death of one the survivor is entitled to the balance. The Supreme Court affirmed the reestablishment of the joint account but in addition made some interesting modifications of the original judgment. The appellant guardian had contended that in the absence of evidence other than the form of the deposit itself, no presumption of joint tenancy arises and that such deposit is only conclusive on the question of both parties having a right to withdraw as long as both live and remain competent. The court refused to sustain that contention and held that Section 221.45¹⁹⁷ specifically provides that a joint tenancy is

59 (1939); Will of Mechler, 246 Wis. 45 (1944); *Ruffalo v. Savage*, 252 Wis. 175, (1948).

¹⁹¹ *Supra*, note 80. See discussion, *supra*, p. 104.

¹⁹² *Estate of Staver*, *supra*, at p. 119 the court speaks of "joint owners," at p. 121 "... the legal title to the chose in action is in the depositor and the other joint payee jointly"

¹⁹³ *Supra*, note 59.

¹⁹⁴ *Ibid.* at p. 145.

¹⁹⁵ *Supra*, note 59.

¹⁹⁶ 264 Wis. 15, 58 N.W.2d 411 (1953)

¹⁹⁷ WIS. STATS. (1955) §221.45: *Joint Deposits Payable to Either Depositor*. When a deposit has been made or shall hereafter be made, in any bank, trust company bank or mutual savings bank transacting business in this state in the names of 2 persons, payable to either, or payable to either or the survivor,

created upon such facts as are presented in the *Boehmer* case. The court states:¹⁹⁸

"In the *Staver* case, *supra*, at page 124, the court construed that statute as giving the right of survivorship to either payee; and found, at least inferentially, that such a situation creates a joint tenancy.

"Consequently, under authority of the *Staver* case, *supra*, and sec. 221.45, STATS., it is our conclusion that when Jacob Boehmer opened an account in July, 1948, in his own name and that of his wife, in said First National Bank, a joint tenancy was created inuring to the benefit of both during their lives, with a right of survivorship enjoyed by either party upon the death of the other."

The question of whether Mr. Boehmer's right of withdrawal involved the exercise of a personal election that only he could have exercised before his incompetency is decided by the court in the affirmative. It concludes that this personal right could not be exercised by a guardian, but that the court must determine what, if anything, is necessary for the best interests of the incompetent and if funds are necessary the court will order such withdrawal. To safeguard all withdrawals whether by Mrs. Boehmer or the guardian the court placed the funds in *custodia legis* with no right of either the wife or guardian to withdraw except upon court order. It would appear from the court's decision that the relationship of joint owners of a bank account is governed by rules broader than the terms of the contract with the bank. The special fact situation in the *Boehmer* case makes the rule announced by the court a fair and logical one. It is difficult to conceive, however, of a strict application of joint tenancy rules to joint accounts.

Nevertheless the recent case of *Estate of Schley*¹⁹⁹ illustrates the court's determination to apply joint tenancy rules to govern the rights and obligations of the joint depositors as between themselves. It is interesting to note in this and the *Boehmer* case the ease with which the court finds that a joint tenancy exists. It ignores the problems and the dilemma which plagued it in the *Staver* case when in order to give effect at all to a joint bank account, it had to ignore the traditional requirements of joint tenancy, gifts, etc. and hold that the incidents of the relationship created by a joint account were determined by the contract between the depositors and the bank.

In the *Schley* case, Mrs. Schley deposited funds originally her own into an account for which certificates of deposit were issued payable to William Schley and Bertha Schley, either or survivor. From time to

such deposit or any part thereof, or any interest or dividend thereon, may be paid to either of said persons whether the other be living or not; and the receipt or acquittance of the person so paid shall be a valid and sufficient release and discharge to the bank for any payment so made.

¹⁹⁸ 264 Wis. at p. 20.

¹⁹⁹ 271 Wis. 74, 72 N.W.2d 767 (1955).

time withdrawals were made and new certificates issued sometimes in Bertha's name alone and ultimately at the time of her death the names on the certificate were Bertha and two other persons. Some other certificates representing deposits of moneys originally belonging to Mr. Schley were in the names of William and Bertha through several transactions until her death. In determining the husband's right to recover the deposits which had been changed to eliminate his interest therein, the court recognized the *Staver* case as determining the rights of survivorship of funds deposited in this way. The court states that its attention had not been called to any case decided by it in which the rights of two named depositors during the lifetime of each were determined.²⁰⁰ Sec. 221.45, STATS.²⁰¹ is clearly for the protection of banks, the court noted, but

"Sec. 230.45 (2), provides that any transfer or assignment of personal property from husband to wife, or from wife to husband, which conveys an interest in the grantor's personal property and by its terms evinces an intent to create a joint tenancy, shall be held to create such joint tenancy.

"The only competent evidence in the record as to the agreement between the parties, or one of them and the bank, is the instruments evidencing the deposits. It is clear that when Mrs. Schley in 1946 had certificates issued payable to William Schley and Bertha Schley, either or survivor, this was an assignment of personal property from wife to husband which conveyed an interest in her personal property and by its terms evinced an intent on her part to create a joint tenancy between herself and her husband."

The court went on to hold that although under the statute she had the right to withdraw, she did not have the power or right to appropriate and destroy her husband's interest in the account. When she made the withdrawals without her husband's consent her acts severed the joint tenancy but did not destroy her husband's joint and equal interest therein. To the extent the funds could now be traced the court held that the husband was entitled to one-half.

The court's application of Sec. 230.45 (2)²⁰³ to sustain a true joint

²⁰⁰ Apparently the *Boehmer* case, *supra* note 196, decided two years before, was not called to the court's attention. Fortunately, they appear to be in accord.

²⁰¹ *Supra*, note 197. §221.45 and 222.19(9) (which is almost identical with the New York statute set out on page 120, *supra*) have had better effect in the development of the rules with regard to joint bank accounts. §221.45 was mentioned as a makeweight argument in the *Staver* case and is spoken of in respect to the protection it affords the bank in making payments to a co-depositor in the *Marshall & Ilsley Bank* case (*supra*, note 59), the *Dupont* case (*supra*, note 33) and the *Schley* case. Somewhat greater weight was given to that section in the *Boehmer* case (*supra*, note 196). §222.12(9) has never been cited by the court in any joint savings account cases. Since this section is identical with the New York statute it is interesting to note the differing importance attached to it. (*Supra*, p. 120).

²⁰² 271 Wis. at p. 80.

²⁰³ *Supra*, note 12.

tenancy as between the joint depositors ignored the necessity to sustain on some legal concept the transfer from the wife to the husband. Nor does this case solve the problem of a joint deposit in the names of two persons not husband and wife. The statutes do not permit a joint tenancy to be created in personal property by a transfer from one to himself and another, not husband and wife.²⁰⁴

A suggested solution might be for the court to apply the *Staver* rule strictly for the creation of the relationship in order to eliminate problems of gift and technical joint tenancy rules and then hold that the contract which governs the relationship incorporates by its terms—either express or implied—the incidents of joint tenancy in governing the rights and obligations of the joint depositors.

It is hoped that the foregoing review of the law as it pertains to joint tenancies in real and personal property will illustrate its dynamic nature and prove helpful in pointing out the many problems even though solutions are not always suggested.

²⁰⁴ *Supra*, note 13; also *supra*, p. 106.